
From: Wayne, Don
To: Carlin, Jayne
CC: Solloway, Chris; Hall, Lynda; Henning, Alan; Sweeney, Stephen
Sent: 5/27/2014 3:41:23 PM
Subject: RE: FYI from Inside EPA: Pesticide Pact Highlights Environmentalists' Push To Advance New ESA Process

Intriguing, Jayne. This looks hopeful, but I'm guessing the timing of the proposed action will not be particularly helpful to laying this issue to rest before we finalize the Oregon CZARA decision document. Still, it could be something that we reference in that document and our response to comments.

From: Carlin, Jayne
Sent: Tuesday, May 27, 2014 3:29 PM
To: Henning, Alan; Wu, Jennifer; Wayne, Don; Solloway, Chris; Flahive, Katie; allison.castellan@noaa.gov; Carvalho, Gabriela; Liu, Linda; Croxton, Dave; Psyk, Christine
Subject: FYI from Inside EPA: Pesticide Pact Highlights Environmentalists' Push To Advance New ESA Process

Pesticide Pact Highlights Environmentalists' Push To Advance New ESA Process

Posted: May 23, 2014 in Inside EPA

EPA and environmentalists have tentatively settled potentially precedent-setting litigation seeking to force EPA to take steps to protect listed species from pesticides, underscoring advocates' broad efforts to implement advice from the National Academy of Sciences (NAS) for assessing risks under the Endangered Species Act (ESA), sources say.

In [a filing earlier this month](#) in *Northwest Coalition for Alternatives to Pesticides (NCAP) et. al., vs. EPA and CropLife America et. al.*, environmentalists and federal officials indicated they have tentatively settled the potentially precedential litigation seeking to require EPA to take formal steps to protect endangered species from certain pesticides and to consult with wildlife officials on how to protect species from several other pesticides.

The May 2 filing pending in the U.S. District for the Western District of Washington, says the parties have reached an agreement in principle and asked the court to extend a stay in the case.

While details of the settlement are not yet known -- the filing says that EPA will release a draft for public comment before finalizing the deal -- an environmentalist observing the case says the settlement could facilitate the agencies' effort to begin implementing interim approaches announced last year by the National Academy of Sciences (NAS) to reconcile the competing statutory requirements of the ESA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which have long hampered federal pesticide reviews under ESA.

"The main goal has been to try to come up with a solution that gives the services and EPA some space to actually complete some national consultations," says one environmentalist, speaking about activists' broad strategy to encourage federal officials to protect listed species. And a second environmentalist said, "Ultimately, what everyone cares about on our side is getting some protections on the ground for species."

The case is one of a handful where environmentalists are working to force EPA to follow NAS' advice. Earlier this year, several groups threatened to sue over the agency's decision to register a new pesticide, cyantraniliprole, that did not follow the NAS' recommended process.

The agency had registered cyantraniliprole earlier this year without consulting with the services on the product's risks to endangered species despite finding the pesticide moderately to highly toxic to aquatic invertebrates. Additionally, EPA's screening level risk assessment found cyantraniliprole could pose direct adverse effects to listed aquatic invertebrates and listed insects from acute exposure. But [in the registration](#), EPA said cyantraniliprole poses less risk to listed species than already registered pesticides, and that given limited resources, officials will conduct consultations during registration review.

But in a March 21 letter to EPA, Defenders of Wildlife, the Center for Food Safety and the Center for Biological Diversity signaled that advocates plan to fight to ensure that the agency's new assessment process is applied to new substances as well as existing chemicals.

Services Consultation

EPA is required under Section 7 of the ESA to consult with the services -- to determine whether an agency action could cause jeopardy to an endangered or threatened species. If the services -- the National Marine Fisheries Service (NMFS) and Fish & Wildlife Service -- determine that there is the potential for jeopardy, they will craft a biological opinion (BiOp) laying out reasonable and prudent alternatives (RPAs) that

EPA must implement to better protect the species.

But EPA has long sidestepped the consultation and mitigation requirement, in part because of scientific and policy differences among the agencies and their guiding statutes. Under FIFRA, EPA is required to ensure that a pesticide cannot cause an "unreasonable adverse effect" to the environment. But ESA imposes a more stringent prohibition, barring actions that cause "jeopardy" to a species or habitat. In recent years, environmentalists have sued the agency over its pesticide registrations using the ESA in order to force more protections for species.

Although the NCAP case is one of several suits environmentalists have filed to force ESA consultations, it also includes the novel step of aiming to force EPA to implement wildlife officials' recommendations from two completed BiOps to protect species.

But since the suit was filed, EPA and the services have agreed on a new approach for streamlining ESA consultations for new or renewed registration. In November, they issued a paper outlining interim steps that respond to the NAS' April 30 report urging federal officials follow a common risk assessment process that considers statutory obligations under both ESA and FIFRA.

Under the new three-step process, staff will determine whether a pesticide may cause an effect, whether an adverse effect is likely and whether jeopardy or an adverse modification to a species will occur. Each step is based on EPA's existing risk assessment framework. Information generated in one step of the process, through data, analytical processes and models shared between agencies, will then be used in the subsequent steps of the process.

While federal officials hope to assess possible risks from many different pesticides to endangered species, environmentalists say the substances at issue in the NCAP case are among the worst chemicals still in use in agriculture and among the few that have already gone through some form of ESA consultation.

Specifically, the suit seeks to force EPA to implement RPAs to better protect salmon from three organophosphate (OP) pesticides and several carbamate pesticides as laid out by NMFS in two BiOps. The BiOps stemmed from prior suits that forced EPA to consult on the pesticides. NMFS released the OP RPA in November 2008, and the carbamate RPA in April 2009.

But industry successfully challenged the OP BiOp in *Dow AgroSciences, et al. v. National Marine Fisheries Service et. al.*, arguing that its conclusions were unjustified. The U.S. Court of Appeals for the 4th Circuit in February 2013 vacated the BiOp finding that NMFS erred in setting RPAs of fixed buffers of 500 feet for ground spraying and 1,000 feet for aerial applications from bodies of water and potential salmon habitat, noting that the service failed to justify why buffers were not tailored to the streams they are meant to protect.

Further, the court found, in failing to take into account other RPAs, NMFS did not meet the "economically feasible" requirement as detailed by the ESA.

Jeopardy Finding

Environmentalists filed a supplemental complaint in NCAP in August arguing that the reasoning behind the jeopardy finding for the effects of OP pesticides on the species was not in question by the appellate court. The groups argued that recent advice from federal science advisors on how to assess risks to endangered species from pesticides shows that conclusions from wildlife officials that EPA's approval of the three pesticides are causing harm to listed salmon species are sound despite the rejection of the assessment by the appellate court.

A working group of House Republicans in a Feb. 4 report, continued industry and GOP opposition to the 2008 NMFS BiOp, which instructs EPA to protect a score of endangered species of salmon from risks from long registered pesticides through measures including buffer zones that preclude pesticide use near water bodies, which could result in more than \$500 million in lost revenues to the agricultural sector.

The environmentalist observing the NCAP case said much of the controversy surrounding the salmon BiOp stemmed from the size of buffer zones precluding pesticide use near water bodies. The source noted that determining the size of buffer zones was a challenge in the early BiOps and that the services exercised caution. Further complicating the BiOp, the source said is that the habitat of endangered salmon in the Pacific Northwest is unusually large, compounding the impact of the buffer zone for industry.

An industry source familiar with the NCAP case says that the BiOps involved are not scientifically sound. And because they were conducted prior to the 2013 NAS report, they do not reflect the science advisors' recommendations, which have been incorporated in the interim approaches.

The solution that makes the most sense, the industry source said, would be to conduct those BiOps again under the new approaches when the pesticides enter registration review. "If you develop a process that has some widespread agreement," the source said, referring to the interim approaches, "you're going to avoid a lot of the legal challenges."

The industry source also noted that while environmentalists say they are giving federal officials space to assess risks and protect species, several groups, including Defenders of Wildlife, a plaintiff in the NCAP case, are threatening to sue over the cyantranilprole registration.

But Ya-Wei Li, of Defenders of Wildlife, one of the environmental plaintiffs in the NCAP case, is applauding the federal cooperation that has led to the interim approaches, though at a recent public meeting, he also outlined areas for additional work. He said regulators need better

data on where species habitats are located and where pesticides are used, as well as better models to predict exposures.

Within the next year, Li said, EPA should issue guidance on critical aspects of the approaches like how federal officials will conduct weight of evidence assessments, and in the long run draft a manual on how to conduct pesticide consultations from start to finish.

While there is more work to be done, Li also echoed other environmentalists who have said they want to give the federal officials space to start implementing the new interim approaches as soon as possible. "We really want to be patient with the agencies to work through the process while pushing things along," Li told the workshop. "Five years ago there weren't really strong signs that we were moving in the right direction, but now with the NAS study complete, and a working relationship between the agencies, we have come a long way and that is a good sign." -- *Dave Reynolds* (dreynolds@jwpnews.com *This e-mail address is being protected from spambots. You need JavaScript enabled to view it*)

Jayne Carlin, Watersheds Unit
US EPA, Region 10
1200 6th Ave, Suite 900 (OWW-134)
Seattle, WA 98101-3140
(206) 553-8512, (206) 553-0165 (fax)
carlin.jayne@epa.gov

<http://www.epa.gov/r10earth/tmdl.htm>